

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2007-0513, Jessica F. v. Clinton C. F., the court on April 16, 2008, issued the following order:**

The respondent appeals an order of the trial court, upon remand from an earlier appeal, finding that he stalked the petitioner, his step-daughter. See RSA 633:3-a (2007). He argues: (1) as a matter of law, he had a “legitimate purpose” to engage in the conduct found to be stalking; (2) the record does not support the trial court’s finding that he stalked the petitioner; and (3) the trial court erred by not granting him a full evidentiary hearing upon remand. We affirm.

One who has been a victim of stalking may seek relief in district court through a civil petition, bearing the burden to prove stalking by a preponderance of evidence. See RSA 633:3-a, III-a. Stalking includes “[p]urposely, knowingly, or recklessly engag[ing] in a course of conduct targeted at a specific person that would cause a reasonable person to fear for his or her personal safety . . . [if] the person is actually placed in such fear.” RSA 633:3-a, I(a). A “course of conduct” is “2 or more acts over a period of time, however short, which evidences a continuity of purpose.” RSA 633:3-a, II(a). It does not, however, include “constitutionally protected activity” or “conduct . . . necessary to accomplish a legitimate purpose independent of making contact with the targeted person.” *Id.*

In her petition, the petitioner alleged that on four dates, the respondent entered her bedroom between 4:00 and 5:00 in the morning, and exposed himself by masturbating. Although she did not actually see the respondent masturbate, and had never before heard the sound of masturbation, she testified that she believed he was masturbating because he made a sound she described as the “[f]riction of skin.” She further testified that this conduct made her fear the respondent, and that she placed a knife under her bed because of her fear. Although she admitted the respondent would sometimes enter her room to adjust a thermostat, he came nowhere near the thermostat during the four specified incidents. The respondent did not testify.

In its initial order, the trial court found that the respondent’s acts were targeted at the petitioner, that she was placed in fear, and that her fear was reasonable, but denied the petition because she had not proven the respondent had exposed himself and masturbated. We vacated and remanded, concluding that proof of those facts was not required to establish stalking. On remand, the trial court held a hearing in which the parties presented legal argument regarding the existing record, and offers of proof concerning unrelated conduct allegedly occurring after the earlier appeal. Based solely upon the evidence

submitted at the prior hearing, the trial court found that the respondent had stalked the petitioner, and had no legitimate purpose for his conduct.

We address first the respondent's argument that, as a matter of law, he had a legitimate purpose for being in the petitioner's bedroom on the four occasions at issue. The respondent contends that "[a]bsent proof of something other than a legitimate purpose, an owner of a home has a legitimate purpose to enter any portion of that home." Because the petitioner did not prove he was masturbating or engaging in some other "nefarious or inappropriate conduct," the respondent contends he could not have stalked the petitioner. We disagree.

It was the respondent's burden to prove a legitimate purpose for his conduct; it was not the petitioner's burden to disprove that his purpose was legitimate. See Miller v. Blackden, 154 N.H. 448, 453-54 (2006). To carry his burden, the respondent had to show that he had a purpose, that was itself lawful, for being in his step-daughter's bedroom in the early morning hours and making a "friction of skin" sound. See id. at 454. The respondent having elected not to testify as to what his purpose was, we conclude that the trial court did not err by finding that he had no legitimate purpose. See id.

Nor is the record insufficient to support the trial court's findings. The respondent argues that there was no evidence to support the trial court's findings that he lacked a legitimate purpose, and that the victim's fear was reasonable. We review these arguments as a matter of law, and will uphold the trial court's findings and rulings unless they lack evidential support or are tainted by legal error. See id. at 455. We view the evidence in the light most favorable to the petitioner, according considerable weight to the trial court's judgment as to her credibility and the weight of her testimony. See Fisher v. Minichiello, 155 N.H. 188, 190 (2007).

As noted above, it was the respondent's burden to prove a legitimate purpose. Given his failure to testify, and the petitioner's testimony that, on the four occasions at issue, the respondent stood nowhere near the thermostat, we cannot conclude that the trial court's finding that he had no legitimate purpose was lacking in evidential support or legally erroneous. As to the petitioner's fear, we conclude that a reasonable finder of fact could have found the petitioner's fear, upon these facts, to have been a reasonable fear.

Finally, we address the respondent's argument that he was entitled to another full evidentiary hearing. The respondent claims that he chose not to testify upon the mistaken belief that the petitioner had to prove he masturbated, and that his rights to due process and to produce all favorable proofs under Part I, Article 15 of the New Hampshire Constitution entitled him to another hearing once we ruled that the petitioner was not required to prove that he masturbated.

“In New Hampshire, criminal defendants have an explicit right to produce all proofs that may be favorable to them.” State v. Laurie, 139 N.H. 325, 329 (1995) (quotation and brackets omitted) (emphasis added). The respondent cites no authority extending this protection to civil litigants. Nor does the state constitutional right to due process here compel a second evidentiary hearing.

“Generally, a trial court is free upon remand to take such action as law and justice may require under the circumstances as long as it is not inconsistent with the mandate and judgment of the appellate court.” State v. Abram, 156 N.H. \_\_\_, \_\_\_, 941 A.2d 576, 580 (2008) (quotation omitted). Where, as here, we have remanded a matter because the trial court applied an incorrect legal standard, the trial court generally has discretion to determine whether the existing evidentiary record suffices to make the findings and rulings required of it upon remand. See, e.g., State v. Novak, 147 N.H. 580, 583 (2002); N.H. Challenge v. Commissioner, N.H. Dep’t of Educ., 142 N.H. 246, 250 (1997).

As we noted in the prior appeal, the petitioner did not attempt to add additional allegations to her petition at trial; she simply did not prove all of the allegations she had made. Although she did assert new allegations upon remand, the trial court did not rely upon those allegations in finding that the respondent had stalked her, but relied solely upon the evidence adduced at the prior hearing. The respondent had notice of the allegations against him in the petition, and we are not persuaded that, merely because he may have mistakenly believed that the petitioner was required to prove all of those allegations, he was entitled to a second full evidentiary hearing.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,  
Clerk**